Hebert Industrial Insulation Corporation *and* The International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL–CIO. Case 3–CA–16797

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 17, 1993, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed cross-exceptions. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hebert Industrial Insulation Corporation, Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Refusing to bargain collectively with the International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL–CIO (the Union) by unduly delaying in furnishing responses to the Union's requests for information as to the possible single employer/alter ego status of the Respondent and Brown's Race and by failing to furnish all data the Union sought.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL–CIO (the Union) by unduly delaying in furnishing responses to its requests for information as to the possible single employer/alter ego status of Brown's Race and Hebert Industrial Insulation Corporation and by failing to furnish all data sought thereon.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL promptly furnish the Union with all the data it requested as to any relationship we have with Brown's Race.

HEBERT INDUSTRIAL INSULATION CORPORATION

Mary Thomas Scott, Esq., for the General Counsel.
Carl R. Krause, Esq. (Harris, Beach, Wilcox, Rubin & Levy), of Rochester, New York, for the Respondent.
James R. LaVaute, Esq. (Blitman & King), of Rochester, New York, for the Charging Party.
Andrea M. Basile Terrillion, Esq., on the brief.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Hebert Industrial Insulation Corp. (the Respondent), in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), failed to respond fully to a request by the International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL–CIO (the Union) for information as to its relationship with another employer. The complaint further alleges that the Union needed the requested data in order to perform its duties as the exclusive collective-bargaining representative of

[1] In his discussion of the information that the Respondent supplied to the Union in response to the Union's request, the judge inadvertently stated that the Respondent's chairman, John Biemiller, supplied certain information in an affidavit to the Regional Office on January 29, 1992. (The Respondent gave the Union a copy of the affidavit.) Although Biemiller did provide a January 29 affidavit, the information referred to by the judge was actually included in a February 14, 1992 affidavit.

In his recommended Order, the judge required the Respondent to furnish to the Union information regarding the Respondent and ''Brown's Race Insulation Services.'' In some communications, however, ''Brown's Race'' is variously referred to as ''Brown's Race Insulation Corp.,'' ''Brown's Race Insulation Services, Inc.,'' or ''Brown's Race Insulation Services.'' In order to avoid any confusion, we have modified the judge's recommended Order and notice to refer to ''Brown's Race'' with the understanding that the entity generally referred to as ''Brown's Race'' encompasses any entity mentioned in the record or communications that has ''Brown's Race'' as part of its name.

[2] Member Raudabaugh agrees with his colleagues, for the reasons set forth by the judge, that the Respondent unlawfully failed and refused to provide the Union with relevant requested information, or was dilatory in doing so. He notes that the Respondent does not contest the proposition that all of the requested information is relevant to the question of whether Brown's Race is a single employer or alter ego of the Respondent. Phrased differently, Respondent does not argue that some of the information would be relevant only if and when single employer or alter ego status is shown. Thus, there is no need for Member Raudabaugh to follow the analytical approach that he took in *Arch of West Virginia*, 304 NLRB 1089 fn. 1 (1991).

the employees of the Respondent. The complaint also alleges that the Respondent unduly delayed in furnishing the requested data. The Respondent's answer sets forth three defenses, that it complied with the Union's request, that the Union did not need the data requested in order to fulfill its obligations as bargaining representative, and that the Union had no reasonable grounds to make its request. The information which the Union requested concerns the relationship of the Respondent to a nonunion contractor, Browns-Race Insulation Corp. (Browns-Race).

I heard this case in Rochester, New York, on October 27, 1992. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

The Respondent installs insulation in commercial buildings. In its operations annually, it meets the Board's nonretail standard for asserting jurisdiction. The Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Union has a collective-bargaining agreement with the Respondent which covers employees who install insulation materials on pipes, fittings, boilers, and related equipment. William Urquhart, the Union's business manager, received a telephone call in September 1991 from an individual employed by Frontier Insulation Company (Frontier) who informed him that Browns-Race occupied the same building where the Respondent is located and that, based on his checking with suppliers, he believed that Brown-Race was the alter ego of the Respondent. Frontier, at the time, had a collective-bargaining agreement with the Union.

Urquhart also heard from a representative of Griffen Insulation Company, another insulation contractor which has a collective-bargaining agreement with the Union. That individual told Urquhart that Browns-Race's president, Jim Reisenberger, was driving, on an every day basis, a truck owned by the Respondent. Urquhart also heard from a member of the Union that an individual he had met told him that he was working on a jobsite in Rochester for Browns-Race, installing insulation material, i.e., doing work covered by the collective-bargaining agreements between the Respondent and the Union.

On November 11, 1991, the Union wrote the Respondent, stating that it learned that the Respondent has an ownership interest or a relationship with Brown-Race and that Browns-Race may be doing bargaining unit work. The Union further stated therein that the Respondent may be violating its bargaining obligation to the Union by reason of Brown-Race's nonunion operations. The Union's letter then sought the following data:

> 1. Identify the officers of (the Respondent) and the officer of Browns-Race, since 1975.
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> 2. Identify the shareholders of (the Respondent) and of Brown Race and the percentage ownership interest of each shareholder, since 1975.
>
> 3. Identify any persons formerly employed by (the Respondent) who have been or are now employed by Browns Race; and identify the capacity of their employment for each entity and the time periods of such employment, as well as the location of such employment.
>
> 4. Set forth when Browns-Race was formed and if it is a corporation when incorporated, and identify the work [i.e., by job or project, and by beginning and ending dates] that has been performed by Browns-Race within the jurisdiction that would be covered by the collective bargaining agreement between this Local and (the Respondent).
>
> 5. Identify for each of the jobs or projects, the number of employees utilized by Browns-Race in the performance of work that is of the same type as that covered by the collective bargaining agreement. For each employee, identify the length and hours of employment.
>
> 6. Identify any equipment owned by either (the Respondent) and/or Browns-Race which is leased to or utilized by the other, and specify the jobs or projects on which that occurred. Set forth the financial arrangement, if any, governing such use of equipment, and state whether the arrangement is in writing.
>
> 7. Identify jobs which have been bid by Brown-Race and state with respect to each such job whether or no (the Respondent) also bid the job.
>
> 8. Identify any work that has been let from one corporation to another.
>
> 9. Identify any work performed by one of the companies and which was estimated or bid by the other.
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> 10. With respect to any job or project performed by (the Respondent), state whether or not Browns-Race performed work or was present at the same job.
>
> 11. State whether any employees or any personnel affiliated with either company are sometimes employed by the other company or receive renumeration from the other company, and if so, describe the circumstances under which that has occurred or occurs.
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> 12. State the business location(s) (by number and street and mailing address) of each company since the incorporation of Browns-Race. Identify the time period and terms by which either company provided office space or office services to or for the other.
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> 13. State the business phone numbers of (the Respondent) and Browns-Race since Browns-Race's incorporation.
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> 14. Identify amount(s) involved, reason(s) for and date(s) of transfer of any funds between (the Respondent) and Browns-Race or the principals of the companies.
>
> 15. Identify amount(s) and amount(s) of the line(s) of credit, past or present, of each company.
>
> 16. Identify amount(s) involved, dates, and where applicable, project, when either company has operated its capital with a guarantee of performance by the other company or its principal(s).
>
> 17. Identify each company's present or past building or office materials suppliers.
>
> 18. Identify businesses that use or have used the tools or equipment of each company.
>
> 19. Identify those of the following services that are or have been provided to either company by or at the other company, setting forth dates and identity of persons providing such services; administrative, bookkeeping, clerical, detailing, drafting, engineering, esti-

mating, bidding, managerial, negotiating jobs, pattern-making, sketching, and any other services (describe).

20. Identify customers referred by either company or its principals) to other.

21. Identify any customers past or present of either company who have been or are now customers of the other company. In each such case, state the calendar period and dollar volume of business performed for the customer.

22. For each company, identify the Directors, since 1975.

The Union wrote the Respondent in that letter that it must have the answers in writing in 1 week. It received no such reply. Instead, an attorney wrote the Union on November 21 stating that he represents Browns-Race and that the Respondent has sent the Union's letter of November 11 to Browns-Race. The Browns-Race attorney wrote also that, although Browns-Race has no obligation to cooperate with the Union, it would disclose to the Union, in return for a written pledge of confidentiality, certain data requested but not those items pertaining to confidential and proprietary information, such as the number of shares held by shareholders, the jobs bid on or performed by Browns-Race, Browns-Race's financing arrangements or the names of its suppliers. He further assured the Union that Browns-Race and the Respondent had different officers, directors, shareholders, attorneys, accountants, customers, offices, equipment, and employees.

On November 25, 1991, the Union wrote Browns-Race for clarification. On November 27, Browns-Race's counsel replied that it would furnish information it had already made public via filings of bids and other documents and, on a pledge of confidentiality, it would furnish several other particulars. The Union then wrote Browns-Race that it had to reserve the right to disclose, to governmental agencies or the courts, any data it received pursuant to its request. The record discloses no further correspondence between Browns-Race and the Union.

On November 25, 1991, the Union wrote the Respondent asking for a direct response to its November 11 letter. By letter of December 2, the Respondent informed the Union that it will not answer some of the demands ''as they get into some competitive issues.'' It did furnish data concerning itself, but none as to Browns-Race. Thus, it answered the items, as numbered in the Union's requests, as follows:

1. J.B. Biemiller, Chairman; Lee D'Amico, President.

2. The Shareholders are the Officers.

6. A truck is rented to Brown's Race, from time to time, under a written rental agreement.

8. and 10. None

11. The Office Manager of Hebert Construction does work for Brown's Race. The arrangement is between she and Brown's Race and the two Companies are not involved.

12. The Hebert Companies have been 192 Mill St. for some months.

13. Hebert Companies 263-3410.

16., 19., 20., None

22. See #2.

On January 6, 1992, the Union filed the unfair labor practice charge in this case to protest the Respondent's not furnishing the requested data. On January 29, the Respondent's counsel wrote the Union, enclosing a copy of the affidavit of John Biemiller, the Respondent's chairman, that was sent to the Board's Regional Office in answering the charge. That affidavit contained the following answers to the Union's request for data:

1. The officers of the Respondent are John Biemiller and Lee D'Amico. (It has) no other officers.

2. The officers of Browns-Race are James Reisenberg, John Biemiller and Lee D'Amico.

3. The shareholders of the (Respondent) had been disclosed earlier, the shareholders of Browns-Race are John Biemiller, Lee D'Amico, Steven Martin,[1] James Reisenberg and John Owens. No shareholder has a majority interest in Browns-Race. One of the shareholders in (Respondent) owns a majority share, however, for the purposes of these disclosures the percentages of each shareholders holding is not in my opinion relevant.

4. After a search of the records of (the Respondent) and Browns-Race it was discovered that Joseph Bertini was employed by (the Respondent) from 12/30/90 to 9/1/91, as a member of Local 202. He apparently went to work for Browns-Race in November 1991 in what capacity your affiant does not know. I do know where Bertini is employed at this time. During his employment with the (Respondent) he was not employed as an insulation worker, but as a Carpenter. (The Respondent) paid Bertini wages at the Local 26 wage rates. However, Bertini was never a member of Local 26 while employed by the (Respondent).

The same record check disclosed that Jody D'Amico who is Lee D'Amico's son worked as a driver and warehouseman for the (Respondent) for 50.5 [hours] between 8/11/91 to 9/1/91. Jody D'Amico has never been a member of Local 26 or Local 202. Jody has worked for Browns-Race part-time for a while and full-time beginning in September, 1991 and is no longer employed by Browns-Race. These are the only common employees that my search has turned up except as already noted.

5. Your affiant knows of no work that has ever been let from one of the (Respondent) to Browns-Race or vise [sic] versa.

6. The (Respondent) and Browns-Race estimate their own work. Neither estimates any work for the other.

7. The (Respondent) and Browns-Race have never performed any work for the other nor have they been present on a job being done by the other.

8. Except as already stated no employee, Officer of Director of (the Respondent) receives or has received any renumerations or benefits from Browns-Race, or vice versa, nor are any of them employed by the other.

9. (The Respondent) loaned Browns-Race $7,000.00 in December, 1991 for the use of Browns-Race in any fashion it chooses, in consideration it received a note with interest at the rate of 7.5% said note is callable on

[1] Subsequently, the Respondent informed the Union that Steven Martin's name was included in error and that he has no interest in the Respondent.

demand. John Biemiller personally loaned Browns-Race $6,000.00 in October, 1991 to be used for any purpose it chooses, and in consideration he received a note with interest at the rate of 7.5% said not is callable on demand, and has been paid down to $4,000.00 as of this writing.

10. As noted in my earlier affidavit the (Respondent has) a line of credit, the amount of which is not relevant. To the best of your affiants knowledge Browns-Race has no line of credit.

11. The (Respondent purchases) materials and supplies from independent third parties who bill (the Respondent) for their purchases. Neither your affiant nor any other person employed by the (Respondent) knows who Browns-Race suppliers are, but the (Respondent does) not and have never paid a bill for any materials, supplies or any other thing of value received by Browns Race.

12. The principals of the (Respondent) or their employees have not referred customers to Browns-Race or vice versa.

13. The Directors of (Respondent) are John Biemiller and Lee D'Amico. The Directors of Browns-Race are the persons identified as its shareholders.

On August 18, 1992, the Respondent furnished the Union with a copy of another affidavit of its chairman, which contained the following data:

1. Identify the officers of (the Respondent) and the officers of Brown's Race, since 1976.

Response: The officers of (the Respondent) are John Biemiller and Lee D'Amico. The officers of Browns-Race are James Reisenberg, John Biemiller and Lee D'Amico.

2. Identify the shareholders (the Respondent) and Browns-Race and the percentage ownership interest of each shareholder, since 1975.

Response: The shareholders of (the Respondent) are John Biemiller and Lee D'Amico. Biemiller has a 51% ownership interest in (the Respondent) and D'Amico has a 49% ownership interest in Hebert. The shareholders of Browns-Race are John Biemiller, Lee D'Amico, Stephen P. Martins, James Reisenberg and John Owens. Biemiller and D'Amico each have a 35% ownership interest in Browns-Race. Martins, Reisenberg and Owens each have a 10% ownership interest in Browns-Race.

3. Identify any persons formerly employed by (the Respondent) who have been or are now employed by Browns-Race and identify the capacity of their employment for each entity and the time periods of such employment, as well as the location of such employment.

Response: Joseph Bertini was employed by (the Respondent) from 12/30/90 top 7/1/91 as a member of Local 26. From August 30, 1991 until September 1, 1991 Bertini was employed by (the Respondent) as a member of Local 2020. Bertini's last full week of employment at (the Respondent) ended August 11, 1991. During two subsequent pay periods (the pay periods ending August 25 and September 1, 1991) Bertini worked for (the Respondent) sixteen (16) and twelve (12) hours, respectively. Bertini was paid Local 26 wage rates but he was never a member of Local 26 while employed by (the Respondent).

On August 12, 1991, Bertini became employed by Browns-Race. During the three-week period Bertini was on the payrolls of both (the Respondent) and Browns-Race, he was employed by the Respondent as a carpenter (work not covered under the agreement between the ((Respondent) and the Union), not as an insulation worker.

Jody D'Amico, son of Lee D'Amico, worked as a driver and warehouseman for the (Respondent) for 50.5 hours between 8/11/91 to 9/1/91. Jody D'Amico has never been a member of Local 26 or Local 202.

Jody D'Amico has worked for Browns-Race on both a part-time and full-time basis, beginning September, 1991. At the time my affidavit in response to the Union's request for information was executed on February 13, 1992, Jody D'Amico was no longer employed by Browns-Race. At the present time, however, he has resumed his employment with Browns-Race.

Also, Sheila Montgomery, the officer manager of the (Respondent), works part-time for Browns-Race in an independent arrangement with Browns-Race.

4. Set forth when Browns-Race was formed and if it is a corporation when, it incorporated, and identify the work [i.e, by job or project, and by beginning and ending dates] that has been performed by Browns-Race within the jurisdiction that would be covered by the Collective Bargaining Agreement between Local 26 and (the Respondent).

Response: Browns-Race was incorporated on August 15, 1991. All work Browns-Race performs is generally the type of work which falls within the jurisdiction of the Collective Bargaining Agreement.

5. Identify for each of the jobs or projects, the number of employees utilized by Browns-Race in the performance of work that is of the same type as that covered by the Collective Bargaining Agreement. For each employee, identify the length and hours of employment.

Response: As stated previously, the nature of the work performed by Browns-Race generally within the jurisdiction of the work performed by Hebert Industrial. Your dependent does not know length and hours of employment for each employee employed by Browns-Race on these types of projects.

6. Identify any equipment owned by either (the Respondent) and/or Browns-Race which is leased to or utilized by the other, and specify the jobs or projects in which that occurred. Set forth the financial arrangement, if any, governing such use of equipment, and state whether the arrangement is in writing.

Response: Browns-Race has, from time to time, rented a truck from (the Respondent) for which Browns-Race was billed by the hour in an arms-length transaction. This is the only equipment transaction that has ever occurred between the companies.

From September, 1991 through December, 1991, Browns-Race leased this truck from (the Respondent) for 125 hours, for a total expense of $781.25. From January through March, 1992 Browns-Race leased this truck from (the Respondent) for a total of 48.5 hours and $303.13 in lease fees. The leasing of this truck to Browns-Race by (the Respondent) is governed by an agreement between the parties, dated September 3, 1991. This agreement was cancelled as of July 27, 1992.

Your deponent does not know the particular jobs or projects on which this truck was used by Browns-Race.

7. Identify which have been bid by Browns-Race and state with respect to each such job whether or not (the Respondent) also bid the jobs.

Response: Your deponent does not know those jobs which have been bid by Browns-Race.

8. Identify any work that has been let from one corporation to another.

Response: No work that has ever been let from either one of (the Respondent) to Browns-Race or vice versa.

9. Identify any work performed by one of the companies which was estimated or bid by the other.

Response: The (Respondent) and Browns-Race estimate their own work and neither estimates any work for the other.

10. With respect to any job or project performed by (the Respondent), state whether or not Browns-Race performed work or was present at the same job.

Response: The (Respondent) and Browns-Race have never performed any work for the other at the same job site. They have never been present on a job being performed by the other, and they have never performed any work for the other regardless of job site.

11. State whether any employees or any personnel affiliated with either company are sometimes employed by the other company or receive remuneration from the other company, and if so, describe the circumstances under which that occurred or occurs.

Response: Jospeh Bertini and Jody D'Amico previously have been identified as individuals who were at one time employed by the (Respondent) who have been employed by Browns-Race. (See Response to Inquiry No. 3.) Also, the (Respondent) office manager, Sheila Montgomery, currently provides bookkeeping services for Browns-Race, but she works part-time for Browns-Race in an independent arrangement. In working for Browns-Race, the office manager works at her pleasure and then bills Browns Race for work performed on its behalf.

12. State the business location(s) (by number and street mailing address) of each company since the incorporation of Browns-Race. Identify the time period and terms by which either company provided office space or office services to or for the other.

Response: Browns-Race is located at 192 Mill Street, Rochester, New York 14614. The (Respondent is) located at 192 Mill Street, Rochester, New York 14614. The (Respondent) and Browns-Race are located in the same building but each has a separate address and entrance. The (Respondent) and Browns-Race do not share space. The building in which the (Respondent) and Browns-Race are located is owned by a third party who has no interest in any of the three corporations. Biemiller and D'Amico, in their individual capacities, rent this building from the owner. Biemiller and D'Amico, in their individual capacities, then sublease space to Browns-race pursuant to a separate, written agreement.

13. State the business phones numbers of (the Respondent) and Browns-Race since Browns-Race's incorporation.

Response: The (Respondent) and Browns-Race have different phone numbers and listings in the Yellow Pages. The telephone number for Browns-Race is (716) 263-6990. The telephone number for (the Respondent) is (716) 263-3410.

14. Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between (the Respondent) and Browns-Race for the principals for the companies.

Response: In December, 1991, (the Respondent) loaned Browns-Race $7,000.00 for its use in any fashion it chose. Since the February 13, 1992 affidavit was submitted in response to the Union's request for information, (the Respondent) has loaned Browns-Race an additional $18,300. In consideration for these loans, (the Respondent) has received a note with interest at the rate of 7.5%. These loans are callable upon demand.

John Biemiller personally loaned Browns-Race $6,000.00 in October 1991 to be used by Browns-Race for any purpose it chose. In consideration, Biemiller received a note with interest at the rate of 7.5%. The note is callable upon demand and has been paid down to $3,270.00 as of August 12, 1992.

15. Identify amount(s) and amount(s) of the lines(s) of credit, past or present, of each company.

Response: Although the (Respondent does) have a line of credit, the amount of that line of credit is not relevant to this proceeding. To your deponent's knowledge, Browns-Race has no line of credit.

16. Identify amount(s) involved, dates and where applicable, project, when either company has operated its capital with a guarantee of performance by the other company or its principals(s).

Response: Neither the (Respondent) nor Browns-Race has ever guaranteed the performance of the other.

17. Identify each company's present or past building or office materials suppliers.

Response: The (Respondent purchases) materials and supplies from independent third parties who bill (the

Respondent) for their purchases. The (Respondent) have not or nor have they ever paid a bill for materials, supplies or any other thing of value received by Browns-Race.

The names of (the Respondent's) suppliers are: Insulation Distributors, Tru Temp Industrial Insulations Company, Inc. and Frontier Insulation Contractors, Inc. These suppliers furnish (the Respondent) with insulation materials. Your deponent has no knowledge of the suppliers of Browns-Race, but assumes that (the Respondent) and Browns-Race may have some common suppliers, because there are a limited number of insulation suppliers in this area.

Office supplies used by (the Respondent) are supplied by OFFICEMAX. Your deponent does not know who supplies office materials to Browns-Race.

18. Identify businesses that use or have used the tools or equipment of each company.

Response: The (Respondent has) not published any services, space or tools to Browns-Race, except for the truck previously indicated herein. The (Respondent has) not leased or allowed any other companies to use or lease their tools or equipment. The (Respondent has) not used or leased the tools or equipment of Browns-Race. Your deponent does not know whether Browns-Race has allowed other companies to use or lease its tools and equipment.

19. Identity those of the following services that are or have been provided to either company by or at the other company, setting forth dates and identity or persons providing such services: administrative bookkeeping, clerical, detailing, drafting, engineering, estimating, bidding, managerial, negotiation jobs, patternmaking, sketching, and any other services (describe).

Response: Sheila Montgomery, office manager of the (Respondent) is employed by Browns-Race on part-time basis in an independent arrangement with Browns-Race. On occasion, Montgomery has performed bookkeeping work for Browns-Race at the location of the (Respondent), but not on the (Respondent's) time.

20. Identify customers referred by either company or it principal's to the other.

Response: Neither the principals of the (Respondent) nor their employees have been referred Browns-Race or vice versa.

21. Identify any customers past or present of either company who have been or are now customers of the other company. In each such case, state the calendar period and dollar volume of business performed for the customer.

Response: Those customers of (the Respondent) who may have been or may now be customers of Browns-Race are:

1. Dineen Mechanical Contractors, Inc.
2. Eastman Kodak Co.
3. E. & S. Systems, Inc.
4. Frey and Campbell, Inc.
5. Schlegel Corp.
6. J.P. Bell, Inc.
7. J.T. Mauro Company, Inc.
8. Postler & Jaeckle Corp.

Your deponent or the principals of the (Respondent) do not know the calendar period or dollar amount of business performed for these customers of if they actually are customers of Browns-Race and has in fact carefully avoided obtaining knowledge of information regarding the customers, dollar volumes, or jobs of Browns-Race.

22. For each company, identify the Directors, since 1975.

Response: The directors of (the Respondent) are John Biemiller and Lee D'Amico. The directors of Browns-Race are James Reisenberg, John Biemiller and Lee D'Amico.

On September 30, 1992, the Union wrote the Respondent that it has still ''failed to provide at any time the (names of the) officers of (the Respondent) and Browns-Race for times other than the present; time period and location that Sheila Montgomery, worked for Browns-Race (including specific times during the Respondents work hours when this has occurred; and the particular jobs or projects performed by Browns-Race, employee information regarding those jobs, and jobs on which there was use of equipment owned by one company or the other; jobs bid by Browns-Race; work performed by one company which was estimated or bid by the other; whether Browns-Race at any time performed work or was present at a job or project performed by (the Respondent); arrangements by which (the Respondent) rents space; the suppliers of Browns-Race; and the customers of (the Respondent) who have been or are now customers of Browns-Race, with calendar period and dollar volume of business.''

By letter dated October 8, 1992, the Respondent replied, stating that it disputed the assertions that it had not provided certain particulars sought—e.g., the names of officers at times other than the present. It stated that the names it gave as officers are those of the individuals who always have been the officers. The Respondent acknowledged that it has not furnished the following information as to Browns-Race's operations: (1) the particular jobs or projects performed by Browns-Race, (2) employee information regarding those jobs, (3) jobs bid by Browns-Race, (4) the suppliers of Browns-Race, and (5) the customers of Hebert who are or who have been customers of Browns-Race, with dollar volume business. It asserted that these items are not presumptively necessary and relevant to the Union's representative status. It further stated that the Union's demand, in effect, that its chairman, Biemiller, obtain that data from Browns-Race is unreasonable as Biemiller's affidavit recites that he does not have knowledge of Browns-Race's operations. That letter was the last communication between the Respondent and the Union on the matter of the Union's request for data.

The Respondent conceded that its chairman, Biemiller, could obtain the requested data from Browns-Race but refrained from doing so based on legal advice it received; the Respondent was advised that if Biemiller acted to secure the data from Browns-Race, the Union thereby would be able to use his actions as evidence that Browns-Race is the alter ego of the Respondent.

Analysis

The following excerpt from Judge Barban's decision, adopted by the Board, in *Walter N. Yoder & Sons*, 270 NLRB 652 (1984), sets out the principles governing this case:

> It is well settled under Section 8(a)(5) of the Act a union which has the responsibility of representing employees for the purposes of collective bargaining is entitled to request and obtain information from the employer if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities in representing such employees. In particular, where the employer, party to a collective-bargaining agreement, appears to be conducting a nonunion ''double breasted'' operation, the union party to that agreement is entitled to information from the employer as to the nature of and relationship between the two operations which may reasonably be relevant and useful to the union representing the employees in negotiating or administering and enforcing the collective-bargaining agreement. See., e.g., *Associated General Contractors of California*, 242 NLRB 891 (1979); *Leonard B. Hebert, Jr. & Co.*, 259 NLRB 881 (1981): *Doubarn Sheet Metal, Inc.*, 243 NLRB 821 (1979).

The General Counsel has the burden of establishing that the Union has a reasonable, objective basis to believe that the Respondent may be engaging in doublebreasting. *M. Scher & Sons*, 286 NLRB 688 (1987).

The reports received by the Union's business manager from members of the Union and from competitors of the Respondent respecting the use by Browns-Race of Respondents trucks, the physical proximity of Browns-Race's office to that of the Respondent, and the nature of the unit work reportedly being done by employees of Browns-Race, warrant a finding that the Union had a reasonable objective basis to be concerned that the Respondent may indeed be evading its contractual obligation to the Union by diverting unit work to, apparently, it own creation, i.e.—Browns-Race. The fact that the Union acted on reports it received, and not on direct observations of its business manager does not compel a conclusion that the Union did not have a reasonable basis to inquire. To characterize these reports as ''hearsay'' misses the point. Testimony as to those reports was not offered to establish the truth thereof but only that they were received and acted on by the Union. By definition, under the Federal Rules of Evidence, such testimony is not hearsay.

The Respondent contends that the Board's prohibitions against discovery in Board cases applies here as the Union was endeavoring to receive evidence to enable it to file an unfair labor practice charge alleging that Browns-Race is the alter ego of the Respondent. If there is any merit in that contention, it showed it addressed to the Board; I am bound, respecting the issues before me to follow the clear Board precedent set out in the cases discussed above and also in *Arch of West Virginia*, 304 NLRB 1089 (1991); *Westinghouse Electric Corp.*, 304 NLRB 703 (1991); *Jarvis B. Webb Co.*, 302 NLRB 316 (1991); *Rochester Acoustical Corp*., 298 NLRB 558 (1986).

Respondent asserts a fear that, had its chairman secured the requested data from Browns-Race, it would thereby have indicated, contrary to Biemiller's view, that Browns-Race is its alter ego. Biemiller's affidavits, however, disclose that data be furnished was in fact obtained via searches of Browns-Race's records. In any event, the Respondent's asserted fear is no basis to disregard its clear obligation as spelled out in the cases cited above.

The Respondent has furnished the Union, in a piecemeal fashion, with most of the data requested. It did, however, delay unduly in furnishing most of that data. In delaying, it has failed to meet its obligation to furnish promptly the information sought. See *Electrical Energy Services*, 288 NLRB 925, 932 (1988). Further, it has withheld obtaining and furnishing the Union with information requested, including the customers, suppliers, and employees of Browns-Race.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization as defined in Section 2(5) of the Act.
3. By delaying unduly in furnishing certain data properly requested by the Union and by failing to furnish the remainder of the data sought, the Respondent has failed to bargain collectively with the Union and thereby has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.
4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Hebert Industrial Insulation Corp., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargaining collectively with International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL–CIO (the Union) by unduly delaying in furnishing responses to its requests for information as to possible double-breasted operations by Browns-Race Insulation Services (Browns-Race) and by failing to furnish all data it sought thereon.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respond fully in writing within 10 days of receipt of this Order, to the Union's request for data as to Brown-Race's operations and its relationship with Brown-Race.

(b) Post at its office in Rochester, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the no-

[2] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a

tice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''